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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 211

METROMEDIA, INC., PETITIONER

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 212

METROMEDIA, INC., APPELLANT

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION IN NO. 211

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM IN NO. 212

OPINIONS BELOW

The oral opinion of the district court (Def. App. 13a-19a)[1] is unreported. The opinion of the court of appeals (Pet. A1-A10) is reported at 341 F. 2d 1003.

JURISDICTION

Uncertain as to the proper appellate procedure, Metromedia, Inc., has filed a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit (No. 211) and, in the alternative, has docketed a direct appeal from the judgment of the United States District Court for the Southern District of New York (No. 212). The judgment of the court of appeals was entered March 8, 1965. The petition for a writ of certiorari in No. 211 was filed June 4, 1965. The jurisdiction of this Court in No. 211 is invoked under 28 U.S.C. 1254(1). The district court order was entered on March 25, 1964. The notice of appeal to this Court in No. 212 was filed on May 19, 1964. The district court extended the time in which to docket the appeal until [redacted] and the jurisdictional statement was filed on June 4, 1965. The jurisdiction of this Court on direct appeal is invoked under Section 2 of the Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. We submit, *infra*, p. 9, that this provision is inapplicable and that the appeal in No. 212 should be dismissed.

June 28 1965

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[1] "Def. App." refers to the "Brief and Appendix of Defendant-Appellee" in the court of appeals.

QUESTION PRESENTED

Whether a nonparty may initiate a proceeding in a government antitrust suit for contempt of a consent judgment, where the consent judgment explicitly establishes a different district court procedure through which such a nonparty may enforce the judgment against the defendant.

STATEMENT

ASCAP is an organization of composers, authors, and publishers organized for the purpose of licensing the performance of its members' copyrighted works and protecting them against infringements. In 1941, the United States filed a complaint charging ASCAP with having violated Section 1 of the Sherman Act. The suit was settled by a consent decree, subsequently amended in 1950 and in 1960 (Pet. A3). The decree regulates the relations of ASCAP to its members and sets the terms upon which ASCAP is to issue licenses for the public performance of copyrighted works in its repertory. As pertinent here, the decree requires ASCAP to "grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Decree, Section VI, Pet. App. 9a).[2] Upon receipt of an application for a license, ASCAP is required to "advise the applicant in writing of the fee which it [ASCAP] deems reasonable for the license requested" (Decree, Section IX(A), Pet. App. 11a). If the parties are

[2] "Pet. App." refers to the "Appendix of Petitioner-Appellant, Metromedia, Inc.," in the court of appeals.

unable to agree upon a mutually acceptable fee within 60 days of the filing of the application, the applicant "may forthwith apply to this Court [the District Court for the Southern District of New York], for the determination of a reasonable fee * * *" (*ibid.*).[4] Section XVII of the decree specifically confers upon the "parties" to the judgment the right to apply to the district court for "further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof" (Pet. App. 17a).

Metromedia owns and operates ten radio stations which use compositions licensed by ASCAP. From January 1, 1959, to December 31, 1963, these stations operated under a so-called blanket license which authorized Metromedia to use all of the ASCAP repertory and which provided for computation of royalty payments under a standard formula used in such ASCAP licenses to radio stations. This formula was based in part upon the stations' "net receipts from sponsors" after certain deductions and in part upon their advertising rates. On December 23, 1963, Metromedia applied for a blanket license under which royalty payments would be computed pursuant to a different formula based upon gross, rather than net, receipts from sponsors, with a lower percentage to be

[4] In such a proceeding, ASCAP has the burden of establishing that the fee it seeks to charge is reasonable. ASCAP is also required to give the Attorney General notice of the court proceeding (Decree, Section IX(A), Pet. App. 11a).

charged for that portion of gross receipts exceeding the gross receipts for the year 1962.[4] ASCAP declined to quote a royalty fee computed on this basis. Instead of instituting a proceeding "for the determination of a reasonable fee" in the district court under Section IX of the amended decree, Metromedia demanded that the United States commence a civil contempt proceeding against ASCAP (Pet. A5-A6). The United States declined (Pet. A6).[5]

Metromedia then moved the district court to hold ASCAP in contempt for failure to comply with the amended decree, or, in the alternative, to direct the United States to initiate a contempt action. Both motions were denied (Pet. A6). Because of doubt regarding the proper review procedure, Metromedia filed a notice of direct appeal from the district court's decision in this Court and also prosecuted an appeal to the court of appeals. The court of appeals (Pet. A1-A10) held (1) that it had jurisdiction of the appeal, (2) that Metromedia had no standing to bring the contempt action, and (3) that even if Metromedia were to be

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[4] Metromedia contends that its proposed royalty formula will avoid burdensome accounting problems associated with the net-receipts formula and will remedy a discrimination against it which results from the net-receipts method (Def. App. 6a-8a).

[5] The government at first declined to initiate such a proceeding until the Court of Appeals for the Second Circuit had rendered its decision in *United States* v. *ASCAP, Application of Shenandoah Valley Broadcasting, Inc.*, 331 F. 2d 117, certiorari denied, 377 U.S. 997 (Pet. A6). Thereafter, having made a full review of the facts, the government decided that a civil contempt proceeding was not justified.

deemed to have standing, the allegations did not show any violation of the consent decree since "[t]hus far it is Metromedia—not ASCAP—which has failed to follow the route marked out by the decree" (Pet. A10).

ARGUMENT

1. The court of appeals correctly held that Metromedia lacked standing to maintain a contempt proceeding against ASCAP for violation of the decree entered in the government antitrust suit. Petitioner was not a party to the proceedings initiated by the United States which resulted in the consent judgment against ASCAP and had no right to intervene, had it sought to do so. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683. While Metromedia may, of course, bring a civil antitrust suit against ASCAP (*id.* at 689),* it does not have standing to enforce the government decree, except as provided therein. *United States* v. *Paramount Pictures, Inc.*, 75 F. Supp. 1002, 1004 (S.D. N.Y.); cf. *Restatement of the Law of Judgments*, §§ 79, 93. By its terms, Section

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*Minnesota Mining and Mfg. Co. v. New Jersey Wood Finishing Co., No. 291, O.T., 1964, decided May 24, 1965, upon which Metromedia relies, deals with one of the procedural benefits enjoyed by private antitrust plaintiffs—tolling of the statute of limitations during the pendency of a government proceeding. Congressional solicitude for antitrust plaintiffs has been expressed by conferring this and other advantages applicable in private suits. Congress has not, however, conferred upon private parties the power directly to enforce decrees obtained by the government.

XVII of the decree permits only the "parties" to apply for enforcement orders. This limitation *a fortiori* applies to the initiation of contempt proceedings.

This result rests upon sound considerations. The Attorney General properly has the broadest discretion in deciding to initiate suits under the antitrust laws and in negotiating and agreeing upon consent decrees (*Swift & Co.* v. *United States*, 276 U.S. 311, 331-332; *United States* v. *Ward Baking Co.*, 376 U.S. 327). As the court of appeals held, this discretion "requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings. * * * Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights" (Pet. A9). The risks of multiple and chaotic litigation are especially apparent in this case, where ASCAP has more than 30,000 licensees, all of whom are, like Metromedia, beneficiaries of the consent decree.

Petitioner's position that it has standing derives no independent support from Rule 71 of the Federal Rules of Civil Procedure, which permits a nonparty to enforce an order which has been "made in favor" of that person. The consent judgment was "in favor"

of the United States, not Metromedia.[1] Should Metromedia bring a proceeding under Section IX of the judgment, the district court might then enter orders explicitly "in favor" of it as to which Rule 71 would be applicable.

2. Metromedia, moreover, has a wholly adequate remedy which it has thus far chosen not to pursue. Section IX of the consent decree clearly prescribes the procedure to be followed by license applicants who claim a violation of the decree's provision requiring ASCAP to grant licenses on reasonable terms. If the fee quoted by ASCAP is deemed unreasonable, Metromedia "may forthwith apply to this Court [the district court] for the determination of a reasonable fee." As the district judge explicitly held in this case, it is clear that petitioner's contentions that ASCAP has violated the terms of the consent decree in refusing to quote a fee based upon the formula proposed

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[1] Rule 71 would apply if a judgment expressly named a nonparty as a beneficiary thereof or otherwise expressly conferred upon a nonparty the right of enforcement (see *United States* v. *Hackett*, 123 F. Supp. 104 (W.D. Mo.); *Woods* v. *O'Brien*, 78 F. Supp. 221 (D. Mass.); cf. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502). In addition, in one government antitrust case, the district court held that a nonparty had the right to seek enforcement, although not specifically conferred by the judgment, since no procedure under the judgment was established to permit him to vindicate his rights. *United States* v. *Vehicular Parking*, 7 F.R.D. 336 (D.C. Del.); see also *In re Paleais*, 296 Fed. 403 (C.A. 2); *Secor* v. *Singleton*, 35 Fed. 376 (C.C.E.D. Mo.). This doctrine does not apply here, since the present consent judgment provides a remedy whereby Metromedia may challenge the reasonableness of ASCAP's offered formula or fee.

by petitioner, rather than on ASCAP's standard formula, is fully litigable in a proceeding under Section IX.[8] Petitioner offers no explanation as to why it has failed to pursue this available remedy.

3. The appeal in No. 212 should be dismissed for lack of jurisdiction in this Court. Under Section 2 of the Expediting Act, 15 U.S.C. 29, a direct appeal lies to this Court from final judgments in civil antitrust actions brought by the United States, but not when the controversy "is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned." *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39, 40. *Shenandoah* concerned the same ASCAP decree here at issue, the controversy being whether ASCAP was required to issue a type of license sought by the appellants in that case. Should the Court, however, deem the district court's judgment to be within the Expediting Act, we submit, for the reasons given above, that the judgment was clearly correct and should be affirmed.

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[8] In denying Metromedia's motions, the district judge said:

> I think the most that you can do here is to ask for a blanket license, and then on return of their offer you can ask for a hearing and urge, as you do now, that fixing it on the basis of net receipts is manifestly unjust and discriminatory and violates section 8 of the decree.

The judge went on to encourage Metromedia to bring such a proceeding, to state that he would seriously consider its contentions, and to encourage ASCAP to negotiate seriously with Metromedia over its suggested changes in the license (Def. App. 14a-17a).

CONCLUSION

The petition for a writ of certiorari in No. 211 should be denied, and the appeal in No. 212 should be dismissed or, in the alternative, the judgment in that case should be affirmed.

Respectfully submitted.

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